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IN THE

Supreme Court of the United States

October Term, 1925.

No. 196.

TOWAR COTTON MILLS, Inc.,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal From the Court of Claims.

APPELLANT'S BRIEF.

RAYMOND M. HUDSON,
Attorney for Appellant.

THE REPORTER CO., WALTON, N. Y.
New York Office: 233 Broadway, Room 402. Phone 6070 Barclay.
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TOWAR COTTON MILLS, Inc., Appellant, vs. THE UNITED STATES OF AMERICA, Appellee.	Appeal From the Court of Claims.

APPELLANT'S BRIEF.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims with a findings of fact and a memorandum opinion, dismissing the petition for $22,277.86 with interest from December 1, 1918, and entering a judgment on a counterclaim under the same contract in favor of the appellee for $10,892.75 with interest at 6 per cent from June 3, 1920, and $67.32 costs (59 Ct. Cls. 841).

On June 24, 1918, the appellant entered into a contract with the United States Government, copy of which contract and of the supplemental contract thereto for an advance payment of $32,100 is filed as Exhibit "A" to the petition (R. 2 to 13), under which the appellant agreed to furnish the Government 100,904 lineal yards of No. 4 gray duck for a total

contract price of $107,438.40, of which the appellant performed 19.02 per cent when the contract was thereupon terminated and cancelled by the Government on November 15, 1918 (R. 31, Finding of Fact II).

The contract (R. 11, Art. 3) states that the money advanced was "solely to pay for machinery, equipment, and raw materials." Article 8 (R. 5) *makes time the essence of the contract,* and that likewise the *Government shall have preference and priority over civilian work.* The appellant testified that the contract was taken solely on the understanding that they were to put up the new mill, and were to be protected therefor under the contract. Mr. Scott C. Towar testified:

> "Q. Did Government officers require the claimant to increase the mill's facilities and devote its entire time to Government work? A. It did.
>
> "Q. Did you increase your facilities as testified to by Mr. Henry Towar? A. We did.
>
> "Q. Would you have increased your facilities and built your mill if you had not been promised this contract? A. No; we would not.
>
> "Q. Did you, as soon as you met the requirements and were promised the formal contract, begin the work on the increased facilities and build the new mill? A. Yes."

This testimony was not disputed and the terms of the contract corroborate it.

The Board of Contract Adjustment (Vol. 5, p. 55), in its opinion, conceded and admitted that the terms of the contract, Exhibit "A," were fixed under the understanding between the ordnance officers and the contractor that the increased facilities should be put in and commercial work dropped, and in the so-called award that is in the record (R. 31), which is not

properly an award, there was an allowance of $2,500 for the excess cost of the new mill, which excess cost, the Board said appellant was entitled to as it was the amount that appellant had to pay to rush the completion of the mill in time to manufacture the articles for delivery under the contract.

The appellant filed a claim for $36,332.65 and the War Department allowed $14,054.79 and improperly and incorrectly made out an award under the Dent Act, and sent it to the appellant, asking the appellant to send in its check for the balance claimed under the advancement, and to write on the award "accepted" and then the Government would send the appellant $14,054.79. The appellant refused to send its check or to receive the $14,054.79, but through a misapprehension and inadvertently did so sign the so-called award under the word "accepted" on June 3, 1920, and sometime afterwards, the Government, not being able to get appellant to settle with it, arbitrarily applied the $14,054.79 to what it claimed was due it on the *"advance payment."*

There was no payment of money to, or received by, the appellant; there was no value or consideration for its signing the acceptance on the award, which is void and invalid, nor was there any acquiescence therein.

Mr. Henry M. Towar testified:

> "Q36. Will you look at Paragraph 5 of the petition, pages 2 and 3, and state whether or not it actually sets forth the fact as to the credit by the Government of $14,054.79? A. It does.
>
> * * * * *
>
> "Q56. In your petition on page 5 you state that the claimant signed and returned the voucher, did you not? A. As I recall it, the

> Government asked us to give them our company's check for the total amount due, whereupon they would give us their check for the amount of the award, namely, $14,054.79, which settlement we refused to accept. The Government letter used the words 'voucher' and 'award' synonymously, both referring to the claim of $14,054.79.
>
> "Q57. Then the signature attached to the award wherein you accepted the award is the only signature you have signed concerning the payment of the said sum of $14,054.79? A. It is."

This is not disputed and the appellant's letter of transmittal corroborates it.

It is agreed that at the time of the cancellation on November 15, 1918, the appellant had on hand 189,383 pounds of cotton, which cost $.3208 per pound, for which the Government was liable, but the Government contended that in fixing the loss of the appellant, the average market price of the cotton from December 1, 1918, to March 31, 1919, should be the basis for settlement and the difference between that average price and cost price which was $.0405 should be paid the appellant by appellee. Whereas the appellant contends, as admitted and proven, that on November 15, 1918, cotton was only worth $.27 and that it disposed of the cotton at that time and prior to December 1 at that price in a civilian contract, which was completed before the end of January, and that the appellant was entitled to $.0508 loss, being nearly $.01½ more than the Government contended. There wasn't any increase in price from November 15th until late in January, and then it went up, the largest advance being in March.

The appellant proved a storage item of $45 for

storage subsequent (R. 4) to cancellation and the appellant proved all the other items of the claim, on some of which appellant was cross-examined to some extent.

The Court of Claims held that the so-called award was accepted and that it barred the appellant from any consideration of the rest of its claim.

The Government calculated interest at 7 per cent for some time on its "advance payment," although the note called for only 6 per cent interest.

The so-called award set out in Finding III (R. 31 and 32) under Paragraph 13 stated, "Claims of Government to be deducted $."

As the award thus determined that there was nothing due the Government under the contract on which the award is based, then under a technical construction the award should be held to bar any recovery by the Government, as the "advance payment" was under this same contract.

The Court credited the award as of June 3, 1920, whereas if it should be credited at all, it should be as of November 15, 1918, the date the appellee voluntarily cancelled the contract.

The Board of Contract Adjustment found 25 per cent performed and 75 per cent unperformed, but when it sent the claim back to Claims Board, Director of Purchase, for checking, they accepted appellant's figures, 19.2 per cent and 80.8 per cent, as correct and did not dispute the accuracy of any of appellant's figures in its claim, but only contested their applicability. Thus appellant's $9,620.65 (R. 14) and their $7,670.01 (R. 33) loss on the conceded 189,383 pounds of cotton, appellant's figures being based on price as of November 15, 1918, date of cancellation,

and theirs being based on average price from December, 1918, to March 31, 1919. Again appellant's $14,996.31 cost of new mill (R. 14), their $2,500 (R. 33) allowing only for cost of extra time work to rush completion of new mill and so as to other items of claim.

The appellee took its choice and risked its whole defense on the finality and so-called acceptance of the award as to appellant, but not final as to counterclaim of appellee, but this was before the Court of Claims had decided an award under the Dent Act was final also on appellee.

The Court of Claims, though, based its decision boldly on the finality, and so-called acceptance, of the award, but not being willing to take the chance of reversal that appellee took, attempted to foreclose a review of the effect of the award and so-called acceptance by arbitrarily refusing to find facts proven by undisputed and unquestioned witnesses, and facts that were admitted.

As compensation under the last clause of the second paragraph of Article 14 (R. 7), there is set up in the suit, and claimed, the amount of any balance that was due on the advance payment; see the petition, Paragraph 6 (R. 2), claiming a balance of $22,277.86 after allowing all set-offs and credits which includes the "advance payment."

The appellee is not entitled to recover as the contract, Article 14, Paragraph 2, and last half of Clause 2 (R. 7), provides as follows:

> "And the United States shall also protect the Contractor on all obligations incurred necessarily and solely for the performance of this contract of which the Contractor cannot be otherwise relieved."

The supplemental part of the contract making the advance payment, provides that it is to be used in the contract, and the evidence shows that the Contractor is not otherwise able to be relieved of the obligations, the Government having on its own accord terminated the contract.

The definition of costs on the settlement of this contract, which is made part of the contract by Section 47 (R. 26), provides that the contractor shall not pay interest on this advance payment or similar loans, or rather he shall be reimbursed by the Government for such interest.

The contract, Clause 4, Paragraph 2, Article 14, Exhibit "A" (R. 7), clearly commands that the appellant shall be allowed fair and just compensation when the Government terminates the contract; and this is mandatory. It is as follows:

> "To the above may be added *such sums* as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labor and service rendered under this contract."

It does not say *such sums*, "if any," as in other contracts.

No part or item of the claim in this suit comes under the above clause or provision and the appellant is entitled to an allowance under it.

The appellant is asking for $22,277.86 with interest from December 1, 1918, without allowing any set-off to the Government in the alleged balance claimed by it, as Article 14 requires the Government to protect the appellant in all obligations that cannot be otherwise relieved.

Assignments of Error.

The Court erred in holding:

1. That there can be an award under the Dent Act on a formal contract.

2. That by signing an acceptance of such award and at the same time refusing to receive payment thereof and refusing to pay a balance claimed, the appellant waived all the balance and other items of its claim.

3. That where a contract is cancelled November 15, 1918, the market value of the left over raw material for which the Government is admittedly liable must be fixed at the average market value from December 1, 1918, to March 31, 1919, and not the market value on November 15, 1918.

4. That the Court of Claims need not, and can refuse to, find material, necessary and relevant facts, which are not disputed after the Court has decided a law question against the appellant so as to thus arbitrarily foreclose a review of the law question by this Court.

5. That the award should be credited June 3, 1920, the date thereof, instead of November 15, 1918, the date of cancellation.

6. That the appellant was not entitled to be released from the advance and all interest under Article 14 (R. 7).

7. That it was not mandatory or obligatory on the Chief of Ordnance to allow appellant some compensation under Article 14.

8. That the appellee was entitled to judgment and in allowing 7% interest part of the time.

9. The award valid under the Dent Act and then allowing appellee to recover under the contract, settled by the award, as the award specifically sets out that there are no "Claims of Government to be deducted" from the award.

10. That appellant is not entitled to recover $22,277.86 or any part thereof, with interest from November 15, 1918.

The Argument.

POINT I.

The Secretary of War has no authority to make a valid and binding Dent Act award under a formal contract and if he had, the mere signing thereon under the word "accepted" by appellant, who not only does not receive any money under the award but refuses to so receive any, does not constitute a release of balance on items set out in award nor a release of "fair and just compensation" under the terms of the contract, no part thereof being included in the award; there is no consideration for such release.

This was a formal legal contract and not a Dent Act implied contract (*Union Twist Drill Co. vs. U. S.*, 59 Ct. Cls. 909).

Article 14 (R. 7), after providing for property costs and other actual losses, provides *fair and just com-*

pensation which includes profits; such compensation is mandatory but no sum is included in the so-called award to cover it.

The Court in *McKiernan-Terry Drill Co. vs. U. S.*, 61 Ct. Cls. (December 7, 1925), held that storage subsequent to cancellation is not released by a settlement contract in full payment of contract.

Should the Court construe the award as accepted and as broad enough to cover the items of this suit, then it is void and ineffective to that extent as being without consideration and beyond the intent of the parties, for the Court said in *C., M. & St. P. Ry. vs. Clark*, 178 U. S. 353; 20 Sup. Ct. 924 at 929:

> "In *U. S. vs. Bostwick*, 94 U. S. 53, 67; 24 L. ed. 65, 66, it was said that 'payment by a debtor of a part of his debt is not a satisfaction of the whole except it be made and accepted upon some new consideration.'
>
> "In *Fire Ins. Co. Asso. vs. Wickham*, 141 U. S. 564, 577; 35 L. ed. 860, 866; 12 Sup. Ct. Rep. 84, 87, Mr. Justice Brown stated the doctrine thus: 'The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise but will be treated as without consideration and void.'"

This rule was approved in *San Juan vs. St. John Gas Company,* 195 U. S. 510; 25 Sup. Ct. at 112, where the Court quoted from the *C., M. & St. P. Ry.* case as follows:

> "Because of the well established rule 'that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration.'"

In *Cramp vs. U. S.,* 216 U. S. 494; 30 Sup. Ct. 392, it was held that claims for unliquidated damages on account of extra work caused by the Federal Government are not included in a release given to the United States by the builders of a battleship, of all and all manner of debt, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of the vessel under the contract, provided that the release shall not be taken to include claims arising under the contract other than those which the Secretary of the Navy has jurisdiction to entertain, although the release, if in the form specified in the contract, would have extinguished all claims against the United States, growing out of such contract.

In *Houston Coal Company vs. U. S.,* 262 U. S. 361; 43 Sup. Ct. 612, it was held that where the claimant not only accepted seventy-five per cent of what the President fixed as a fair compensation but actually accepted the full amount of the President's determination, he did not bar his right to sue for the balance he claimed and the opinion, while brief, when read in the light of the brief and the decisions cited in the brief, can lead to but one conclusion, namely, that the plaintiff in this case cannot have cut off his

right to sue for the items involved by the release that was given.

The decision in the case at bar is right in the teeth of *St. L., B. & M. Ry. Co. vs. U. S.*, 268 U. S. 169, 45 Sup. Ct. 472; *So. Pac. Co. vs. U. S.*, 268 U. S. 263, 45 Sup. Ct. 500; and *Western Pac. R. Co. vs. U. S.*, 260 U. S. 271, 45 Sup. Ct. 503.

There being no payment of *fair and just compensation* which is mandatory, then only part of the debt to appellant is provided for in the award.

POINT II.

If the so-called award is a valid and binding award, and was accepted so that appellant cannot sue and recover other and further items and sums, then such award is equally binding and conclusive on appellee and it cannot sue and recover on its counterclaim for "advance payment" under the same contract, as the award stated there was nothing due the appellee under the contract.

Since the decision in the case at bar, the Court of Claims has decided (*Standard Steel Car Co. vs. U. S.*, No. A307, May 11, 1925, 60 Ct. Cls.), that where the Secretary of War made an award under the Dent Act, which is accepted and paid, that thereafter the United States is estopped to sue to recover money claimed to have been illegally paid under the contract covered by the award, unless there was actual fraud, and the Court said, "A claimant being estopped from any further remedy by acceptance of an award, a theory which was invoked by the Government in the

Delaine Mills case, it seems but a just application of the same principle to hold the Government equally bound, unless, of course, it has been 'defrauded.'"

Of course, appellant denies that the award is valid, that it was accepted or that there was any consideration for it, but if it is a bar "to any further remedy" by appellant it is equally a bar to appellee's counterclaim.

POINT III.

The date a Government contract is cancelled all amounts afterwards found due contractor must be credited on any amounts due the Government as of the date of cancellation so as to stop interest as of that date, and all valuation of property under the contract is the market value at the date of cancellation, and this is especially true where cancellation clause requires "cancellation upon fair and equitable terms" and also to "fairly and justly compensate the contractor."

In *Vogelstein vs. U. S.*, 262 U. S. 337, 43 Sup. Ct. at 565, the Court said:

> "The market value of the copper taken *at the time* it was taken measures the owner's compensation (*Seaboard Air Line Ry. Co. vs. U. S.*, 261 U. S. 306, 43 Sup. Ct. 354, 67 L. ed. , decided March 5, 1923; *U. S. vs. Chandler-Dunbar Co.*, 229 U. S. 53, 80, 81, 33 Sup. Ct. 667, 57 L. ed. 1063; *Boom Co. vs. Patterson*, 98 U. S. 403, 407, 25 L. ed. 206; *U. S. vs. New River Collieries Co.* [C. C. A.], 276 Fed. 690, affirmed this day, 262 U. S. 341, 43 Sup. Ct. 565, 67 L. ed.)."

In the *New River Collieries Co.* case above, the Court says:

> "The owner cannot be required to suffer pecuniary loss."

Clearly the time for fixing the price of the cotton was the day the Government cancelled the contract, as it cancelled it and not the appellant, and the appellant could not be required to carry the burden, and loss of interest on money invested in cotton, and to risk the fall in price on the chance of a rise to benefit the Government; the appellant immediately after November 15, 1918, accepted a commercial contract basing its price on this cotton at $.27 per pound, which was its custom in all former commercial and Government contracts, on the price of the raw material at the date of the contract.

The Government having chosen to exercise its right to terminate the contract must pay for the left over material at market prices of same on the day of termination, as appellee picked that day. This is necessary on the principle applied in cases where the Government takes property.

There is no rule of law to differentiate the two, and appellant cannot be, in equity and justice, forced to settle at the price of the material four months later; might just as reasonably make appellant settle at price four years later.

Price at time of refusal to deliver by Government controls when Government breaches its sale. *Roberts vs. Bargamin,* 124 U. S. 64, 8 Sup. Ct. 393; *March vs. McPherson,* 105 U. S. 709; *Consumers Company vs. Stafford Co.,* 239 Fed. 693; *Ralli vs. Rockmore,* 111 Fed. 875; and other cases cited in *Hummel, Trustee, vs. U. S.,* 58 Ct. Cls. 489 at 496.

POINT IV.

The granting of fair and just compensation under Article 14 (R. 7), is mandatory and is not barred by acceptance of the so-called award which does not include any sum for such compensation.

The clause quoted from Article 14 (R. 7) for additional compensation clearly entitled the appellant to that asked in the account, Exhibit "B," and the word "may" in there clearly should be construed as mandatory, meaning "must" or "shall" (see 5 *Words and Phrases*, 4419, and cases cited). It does not say *such sums*, "if any," as provided in many contracts.

In *Pearson vs. Supervisors*, 91 Va. 322 at 333, it is held "may" is "must" as to constables helping voters with ballots.

> "The general rule in the construction of statutes is that the term 'may' when used in a statute means 'must' or 'shall' in cases where the public interest and rights are concerned." *Bean vs. Simmons*, 9 Grat. (Va.) 389 at 391.

The preceding clause also required the Government to protect the appellant on all obligations incurred necessarily and solely for the performance of the contract of which the appellant cannot be otherwise relieved and, under these two clauses, clearly the Government is not entitled to recover its offset claimed in its answer.

Just compensation is the value of the property at time of taking. Loss on a requisitioned contract is the sum which will put contractor in as good a position pecuniarily as if property had not been taken, *U. S. vs. Brooks-Scanlon Corp.*, 265 U. S. 106; 44 Sup. Ct. 471.

POINT V.

As Article 14 requires Government to relieve contractors of all obligation incurred solely for performance of the contract, appellant should be, and by the award was, relieved from any further liability for the advance payment.

The reading of the contract and the award is all that is necessary on this point.

POINT VI.

Where witnesses, whose veracity is not attacked, testify to the necessary and material facts and no evidence is put on to contradict same but most of it was admitted in Claims Board hearings, such evidence constitutes a *prima facie* case and the Court of Claims is required to find such facts, and on its failure to do so, the case should be sent back with instructions to make such finding.

It is the duty of the Court of Claims to make a finding where the evidence is not disputed, for in *Kelly vs. Jackson,* 6 Pet. 622, 631, the Court said:

> "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose. The jury is bound to consider it in that light unless it is invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported."

This was cited and approved in *George vs. Capital Traction Co.*, 295 Fed. 965, 54 Apps. D. C. 144, reversing such a case where the lower court without a jury made a finding of fact.

If this is not true, then the Court of Claims can arbitrarily in any or all cases foreclose any review by this Court, not only of the facts, but of the law by merely refusing to make a finding where the testimony is undisputed on some point that is necessary to be found to entitle a recovery. If the Court of Claims makes a finding contrary to all the evidence or makes a finding, for which there is no evidence to sustain, this Court can go back of this finding, just as it can go back of a verdict, which there is no evidence to sustain it.

Wherefore, it is respectfully submitted that the judgment should be reversed and the judgment for appellee vacated and the case sent back to the Court of Claims for a further findings of fact and with instructions that the appellee is not entitled to recover on the counterclaim.

RAYMOND M. HUDSON,
Attorney for Appellant.